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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-973

JONES TRUCK LINES, INC.,
Petitioner,

vs.

RYDER TRUCK LINES, INC. and AMERICAN CASUALTY COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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JONES TRUCK LINES, INC.,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a Writ of Certiorari issue to review judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case on December 13, 1974.

There is pending before this Court Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit in cause No. 73-1750, styled Pitt County Transportation Company, Petitioner, v. Carolina Freight Carriers Corporation, et al., Respondents, which petition was filed August 13, 1974. For all practical purposes, the question presented in the *Pitt County* case is identical to

that presented in this case; and petitioner suggests that this petition be consolidated with the pending petition in the above case because the action in one of the two cases will probably be determinative of the other.

OPINIONS BELOW

Memorandum opinion of the United States District Court for the Western District of Tennessee was rendered and filed February 19, 1974. It is not reported. Copy is attached hereto in Appendix at pages A1-A3. Declaratory judgment, in accordance with opinion of the District Court, was entered February 21, 1974, and copy is attached hereto in Appendix at pages A4-A5. Opinion of the Court of Appeals for the Sixth Circuit in cause No. 74-1443 of that Court, was decided and filed December 13, 1974 and is reported at ..... F. 2d ..... Copy of said opinion is attached hereto in Appendix at pages A6-A13.

JURISDICTION

Judgment of the Court of Appeals for the Sixth Circuit was entered December 13, 1974 in conformity with opinion of that Court filed on the same date. Jurisdiction of this Court is invoked under *28 U.S.C.A. 1254 (1)*.

QUESTION PRESENTED

Whether indemnity provisions in a "one-way lease agreement" between petitioner, Jones Truck Lines, Inc. ("Jones") and respondent, Ryder Truck Lines, Inc. ("Ryder"), were void and unenforceable as violative of public policy and Interstate Commerce Commission ("ICC") regulations, as set forth in *49 C.F.R. 1057.4*.

STATUTES AND REGULATIONS INVOLVED

The applicable statutes are *49 U.S.C.A. 304 (a) (3) (e)*. The applicable Federal regulations herein involved are *49 C.F.R. 1057.4*, as set forth in Appendix at pages A14-A22.

STATEMENT

References prefixed by the letter "R" are to pages of Appendix filed in the Court of Appeals and contained in record certified by that Court.

Both Jones and Ryder are interstate common carriers. Jones accepted, in Kansas City, Kansas, certain goods for transportation from that point to West Monroe, Louisiana (Exhibit 2, R. 108). Jones was not authorized by ICC to operate in the State of Louisiana, and it was necessary for it to make arrangements with Ryder, which was authorized to transport goods in Louisiana, in order to complete the shipment of goods from Memphis, Tennessee to the destination point in Louisiana (R. 82, 83). The goods were transported by Jones from Kansas City to Memphis in a tractor-trailer it had leased from the owner, one Orin Taylor (Exhibit 1, R. 107, 108). Taylor, at all times material herein, was the driver of the vehicle.

When the vehicle arrived in Memphis, transfer thereof, together with the goods, was made from the ICC authority of Jones to that of Ryder under a "One-Way Lease Agreement" (Exhibit 3, R. 81, 82, 83). Copy of said agreement is attached hereto in Appendix at page A23. The pertinent indemnity provisions are as follows:

> "It is understood that the leased equipment under this agreement is in the exclusive possession, control, and use of the authorized carrier Lessee and that the Lessee assumes full responsibility in respect to the

equipment it is operating to the public, the shippers, and the Interstate Commerce Commission. It is agreed that Lessor will carry acceptable Public Liability and Property Damage insurance. Lessor agrees to reimburse and otherwise indemnify Lessee for any and all losses sustained by Lessee resulting from the use of the aforesaid equipment.

. . . .

. . . Lessor indemnifies Lessee against any loss resulting from the injury or death of . . . drivers.

. . . .

The Lessor shall save the Lessee harmless from any loss, damage or happening giving rise to claims on the part of the shippers. . . ."

This agreement was executed in behalf of the parties by their duly authorized agents. Form of the agreement was prepared by Ryder (R. 81). Ryder's Memphis agent prepared Ryder's freight bill covering balance of the trip (Exhibit 4, R. 101); she also prepared proper Louisiana permits and placard for placement on side of the vehicle, giving Ryder's ICC number and designation (R. 103, 104). In respect to the required ICC inspection of the vehicle, Trial Exhibit 5 is "Report of Vehicle Inspection", purportedly signed by "Harry Marshall" as vehicle inspector. The Report indicates that many items were checked, as inspected, which would require the inspector to start the motor. The vehicle was not inspected by "Harry Marshall", Ryder's designated inspector. On the contrary, Ryder's agent, Mildred S. Rodocker, signed Marshall's name (R. 86). While Mrs. Rodocker was a qualified inspector and testified that she made the inspection (R. 97), it appears she did not get in the truck and start the motor (R. 113). She had not been designated by Ryder to make inspection for it (R. 86).

49 C.F.R. Section 1057.4 (c) provides as follows:

> *"Safety inspection of equipment by the authorized carrier.* It shall be the duty of the authorized carrier, before taking possession of equipment, to inspect the same or to have the same inspected by a person who is competent and qualified to make such inspection and has been duly authorized by such carrier to make such inspection as a representative of the carrier, in order to insure that the said equipment complies with the Motor Carrier Safety Regulations of the Federal Highway Administration of the Department of Transportation. * * *"

Jones shared in no part of the revenue derived from shipment of goods, in question, from Memphis to West Monroe, Louisiana (R. 130).

The driver, Taylor, continued to operate the vehicle after it left Memphis and he became Ryder's agent while driving it to complete the journey. In the course of the trip, after leaving Memphis, before reaching his destination, he was involved in an accident in Louisiana, which resulted in third party personal injuries, property damage and death, with resulting claims against Jones and Ryder (R. 22, 31, 59, 65). Only one third party action had been brought at the time the original complaint was filed in the District Court; this on behalf of one Shull, and Shull's petition for damages filed in a Louisiana State Court was exhibited to the complaint (R. 22). In said petition Shull alleged that he sustained certain personal injuries as a result of certain specified negligent acts of the driver, Taylor. The complaint also alleged that claims have been asserted by representatives of other third parties, and it is anticipated, unless settlements are made, additional suits seeking

damages against both Jones and Ryder will be filed in the State of Louisiana.

Following the accident, representative of Ryder contacted the driver, Taylor, and it was to that individual that the driver surrendered his pertinent papers (R. 115, 116).

Subsequently, Jones filed its complaint for declaratory judgment in the United States District Court for the Western District of Tennessee, pursuant to *28 U.S.C.A. 2201* and Rule 51, Rules of Civil Procedure, for the purpose of seeking a declaration and adjudication that the indemnity provisions in said One-Way Lease Agreement were violative of ICC regulations set forth in *49 C.F.R. 1057.4* (*a*), and that such provisions were, therefore, void as against public policy (R. 3-11). Jurisdiction obtained in the District Court under *28 U.S.C.A. 1331* (*a*).

49 C.F.R. 1057.4 provides, among other things, as follows:

"Other than equipment exchanged between motor common carriers in interchange service as defined in §1057.5, authorized carriers may perform authorized transportation in or with equipment which they do not own only under the following conditions:

(a) *Contract requirements.* The contract, lease, or other arrangement for the use of the equipment:

(1) *Parties.* Shall be made between the authorized carrier and the owner of such equipment.

(2) *Written contract required.* Shall be in writing and signed by the parties thereto, or their regular employees or agents duly authorized to act for them in the execution of contracts, leases or other arrangements.

* * *

(4) *Exclusive possession and responsibilities.* Shall provide for the exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of said contract, lease or other arrangement, except: [Exceptions not relevant to this case.]

* * *"

The District Court held that (1) said indemnity provisions were void as being against public policy as contained in the above ICC regulations, and (2) the exclusive responsibility as between Jones and Ryder for all third party claims resulting from the Louisiana accident was on Ryder.

The Court of Appeals for the Sixth Circuit held in its opinion that said indemnity provisions were not violative of the above ICC regulations, and, accordingly, reversed the District Court.

REASONS FOR GRANTING WRIT

The Court of Appeals for the Sixth Circuit has rendered a decision in conflict with decision of the Court of Appeals for the Seventh Circuit in *Alford* v. *Major*, 470 F. 2d 132 (1972). Further, the Court of Appeals has decided an important question of Federal law, which has not been, but should be, settled by this Court.

Petitioner has already made reference to the fact that there is presently pending before this Court petition for certiorari filed August 13, 1974—cause No. 73-1750—wherein review is sought of the judgment in *Carolina Freight Carriers Corp.* v. *Pitt County Transportation Co.*, 492 F. 2d 243 (C. A. Fourth, 1974). The opinion of the Court of Appeals in the instant case followed the opinion

of the Fourth Circuit in *Carolina Freight* and that of the Fifth Circuit in *Allstate Ins. Co.* v. *Alterman Transport Lines, Inc.*, 465 F. 2d 710 (1972).

The Court of Appeals in this case has held that, notwithstanding the requirement by ICC regulations, that Ryder "shall provide for the exclusive possession, control and use of the equipment and for the complete assumption of responsibility in respect thereto", the indemnity provisions that call for Jones to bear complete ultimate responsibility for all losses, is not violative of or contrary to the regulations. It is submitted that the holding of the Court of Appeals overlooks the reasons and purposes behind enactment of the ICC regulations. It has the effect of permitting Ryder to circumvent the regulations' requirement that leased carriers exert actual control over the leased equipment and the borrowed drivers.

The driver (here Taylor), in fact and in law, became Ryder's agent when he was provided along with the leased equipment. Pursuant to *49 C.F.R. 1057.4 (e)*, Ryder, the lessee, was required to make certain that the driver was qualified and familiar with applicable law and safety standards.

For many years regulated carriers have supplemented their equipment by means of one-way trip leases. Prior to 1948, problems with the practice had become apparent and this Court described many of these in *American Trucking Associations* v. *United States*, 344 U.S. 298, 305 (1953):

> "Because of the fact that the great bulk of the arrangements cover only one trip, leasing carriers have little opportunity or desire to inspect the equipment used, especially in cases where the agreement is made without the operator's appearance at the carrier's terminal. Enforcement sanctions by the carriers for

> violations would be clearly as difficult to impose as route standards. Hence, the carrier may not extend the supervision of rest periods, doctors' certificates, brakes, lights, tires, steering equipment and loading, normally accorded his own employees and vehicles, to equipment and drivers secured through lease. And the owner-operator himself is called upon to push himself and his truck because of the economic impact of time spent off the road and investment in repairs on his slim profit margin. Further, the absence of written agreements, has made the fixing of the lessee's responsibility for accidents highly difficult."

Pursuant to *49 U.S.C.A. 301, et seq.*, the Interstate Commerce Commission, effective in 1953, issued regulations to control abuses. Specifically, the Commission was authorized in *49 U.S.C.A. 304 (e)* to do the following:

"Subject to the provisions of subsection (f) of this section, the Commission is authorized to prescribe, with respect to the use by motor carriers (under leases, contracts, or other arrangements) of motor vehicles not owned by them, in the furnishing of transportation of property—

(1) regulations requiring that any such lease, contract or other arrangement shall be in writing and be signed by the parties thereto, shall specify the period during which it is to be in effect, and shall specify the compensation to be paid by the motor carrier, and requiring that during the entire period of any such lease, contract, or other arrangement a copy thereof shall be carried in each motor vehicle covered thereby; and

(2) such other regulations as may be reasonably necessary in order to assure that while motor vehicles

are being so used the motor carriers will have full direction and control of such vehicles and will be fully responsible for the operation, thereof in accordance with applicable law and regulations, as if they were the owners of such vehicles, including the requirements prescribed by or under the provisions of this chapter with respect to safety of operation and equipment and inspection thereof, which requirements may include but shall not be limited to promulgation of regulations requiring liability and cargo insurance covering all such equipment."

Among the regulations so issued were those dealing with "Augmenting Equipment" now found in *49 C.F.R. 1057.4,* which section applies to One-Way Lease Agreement such as that involved in this case. *Simmons* v. *King,* 478 F. 2d 857, 863 (C .A. Fifth, 1973). These regulations grew out of a decade long proceeding, No. MC-43. History of the legislation and regulations and reasons behind their enactment are set out with clarity in *Simmons, Alford* and *American Trucking.*

The basic purpose of these regulations was to put the entire burden of supervising leased equipment and borrowed operators upon the lessee carrier. There were several reasons for doing this. One reason was to assure that a regulated and hence adequately insured carrier was available to respond in damages, where appropriate, to injured members of the public. This is emphasized in the opinion of the Court of Appeals in this case; but financial responsibility to respond in damages was not the only reason for these regulations.

A purpose of great significance was to insure highway safety by requiring lessee carriers to be responsible, in fact and in law, for supervision of borrowed drivers and

maintenance of leased equipment. The Seventh Circuit realized this when it said in *Alford,* as follows:

> "We agree with the district court that Major has misunderstood the policy behind these regulations. While it is true that one of the objectives of these regulations was to furnish financially responsible defendants to injured members of the public, this was certainly not the exclusive purpose of the regulatory scheme. Indeed, highway safety must be considered to have been one of the paramount goals. As we have seen the regulations call for the inspection of non-owned equipment by the authorized carrier when he takes possession as well as the testing of the driver's familiarity with various federal highway safety regulations. Thus, as the district court held, '*the intent* [of the regulations] *was to make sure that licensed carriers would be responsible in fact, as well as in law, for the maintenance of leased equipment and the supervision of borrowed drivers.*'" (Emphasis added).
>
> (470 F. 2d 132, at p. 135.)

The Court of Appeals for the Sixth Circuit, in its opinion, said:

> "The ruling of the Seventh Circuit in *Alford* v. *Major,* 470 F. 2d 132 (7th Cir. 1972), that the indemnification agreement considered in that case contravened the I.C.C. regulation is not in conflict with the rulings of the Fourth and Fifth Circuits. *This is true for the obvious reason that in Alford* v. *Major, supra, the indemnification agreement itself permitted the lessor to retain full control over the truck and driver* during the full term of the lease in direct violation of the applicable I.C.C. regulation which specifically requires that the *exclusive* control of the equipment shall be

vested in the lessee for the duration of the lease." (Emphasis added).

Petitioner respectfully submits that the Court of Appeals has erroneously construed the *Alford* case, as did the Fourth Circuit in *Alterman,* and the Fifth Circuit in *Carolina Freight.* In *Alford,* the indemnification agreement did not permit the lessor to retain control over the driver, rather, the lessee, Major, *contended* that as a *practical fact,* it had no control over the driver. The Court, in *Alford,* said:

> "Major *contends* that its indemnification clause may be enforced since the actual care, custody and control of the truck remained with the lessor carrier even though Major, consistent with the ICC Regulations, assumed full responsibility therefor to the general public. It is Major's *position* that the ICC Regulations recognize and indeed permit the lessor to furnish its driver to the lessee and that, therefore, these regulations implicitly acknowledge the practical fact that in this situation the lessee carrier has no actual control over the driver furnished by the lessor. Major concludes that the sole purpose of the regulations was to provide injured members of the public with defendants subject to the ICC's minimum insurance requirements and that, this having been accomplished, there is no public policy against indemnification contracts between the lessor and lessee carriers.
>
> * * *
>
> Major's *argument* of course, proceeds from the premise that the actual care, custody and control of the truck remained with the lessor through its driver during the period of the trip lease. Major's related suggestion that the regulations have tacitly acknowledged the practicalities of this situation runs counter to the principal thrust of those regulations. When carefully analyzed, Major's argument would permit the 'practicalities' to override one of the central purposes of the regulations; namely, the prevention of traffic accidents from interstate truck leasing operations. *Therefore, since the indemnification clause would permit Major to circumvent the regulations' requirement that leased carriers exert actual control over the leased equipment and the borrowed drivers, we find that the indemnification clause is unenforceable."* (Emphasis added).
>
> (470 F. 2d at pp. 134-135.)

Obviously, it is much more desirable to prevent injuries by keeping the equipment sound and the driver healthy and skilled in his job than to simply assure recovery after injury. The ICC has no way to assure this state of affairs, except by putting the burden on the entity it regulates, and this it has done by the above regulations.

By the terms of the lease in this case, Ryder delegated back to Jones all care and maintenance of the equipment, except its inspection. If it should be allowed to call on Jones for indemnification for any reason, it will have escaped the effect of the regulations altogether, and their purposes will have been frustrated. The pressure on the regulated lessee carrier to make sure it has sound equipment and a competent driver is relieved.

The Court of Appeals in instant case, in its opinion, asserts that an indemnification provision is not materially different from a contract of liability insurance, quoting both *Alterman* and *Carolina Freight.* We respectfully disagree. The insurance industry knows how to make careless motorists of all kinds pay dearly for their care-

lessness, and many people are employed to keep track of each risk in order that it may be passed on to the insured. The cost of insurance is directly related to losses. Not so with the indemnity agreement, which, if valid, effectively relieves the lessee carrier from all premiums, responsibility and losses.

If the indemnity provisions of the lease agreement are upheld, such provisions would exempt Ryder from responsibility for the consequences of its own negligence; and as set forth by the District Court in *Alford* v. *Major,* 314 F. Supp. 979, 982 (1970), this runs afoul of an established common law rule that:

> "A bargain for exemption from liability for * * * the consequences of negligence is illegal if * * * one of the parties is charged with a duty of public service, and the bargain related to negligence in the performance of any part of its duty to the public, for which it has received or been promised compensation." Restatement of Contracts, § 575 (1932).

The above rule is stated in somewhat different language under "Contracts," *17 Am. Jur. 2d, Section 188,* as follows:

> "It is not the rule that any agreement by any person which assumes to place another person at the mercy of his own faulty conduct is void as against public policy. However, the law does not look with favor on provisions which relieve one from liability for his own fault or wrong. It is a well-settled general doctrine that the law will not sustain a covenant of immunity which protects against fraud or relieves one of a duty imposed by law for the public benefit."

CONCLUSION

Petitioner respectfully submits that this Court should hear this case because there is a conflict among the United States Circuit Courts of Appeals. Compare *Alford* v. *Major,* 470 F. 2d 132 (C. A. Seventh, 1972), affirming 314 F. Supp. 979 (N. D., Ind., 1970), with *Carolina Freight Carriers Corp.* v. *Pitt County Transportation Co.,* 492 F. 2d 243 (C. A. Fourth, 1974), and *Allstate Ins. Co.* v. *Alterman Transport Lines, Inc.,* 465 F. 2d 710 (C. A. Fifth, 1972).

Federal law must control resolution of the problem. Provisions for indemnity, similar to those involved, are common in interstate motor carrier leases throughout the country; and rules of law governing their enforceability should be uniform.

The uncertainty in this area was recently illustrated by the Supreme Court of Nebraska in a case almost identical to the one before this Court. As a prelude to its discussion of *Alford* and *Allstate,* the Court commented that "there are two lines of authority on the specific issue with which we are confronted. They are reported by two federal cases, both decided in 1972. The two cases reach almost diametrically opposite results." *Denver Midwest Motor Freight, Inc.* v. *Busboom Truck, Inc.,* 190 Neb. 231, 207 N. W. 2d 368 (1973). The Nebraska Court, correctly, in petitioner's view chose to follow *Alford.* In any event, the question herein involved should be decided and settled by this Court. Accordingly, for the reasons aforesaid, it is respectfully prayed that a writ of certiorari be granted to

review judgment of the United States Court of Appeals for the Sixth Circuit.

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

Civil C-73-354

JONES TRUCK LINES, INC.,
Plaintiff,

vs.

RYDER TRUCK LINES, INC. and AMERICAN CASUALTY COMPANY,
Defendants.

MEMORANDUM DECISION

(Filed February 19, 1974)

This declaratory judgment action is before the Court after an evidentiary hearing without a jury. It is the contention of the plaintiff (lessor) that the indemnity provision in favor of the defendant (lessee) in the one-way trip lease is unenforceable for two separate reasons. First, plaintiff contends that it is void as being against public policy because a regulation issued by the I.C.C. (Title 49 C.F.R. § 1057.4(a)(4)) provides, in substance, that the lessee must assume complete control of and responsibility for the operation of the leased vehicle. Secondly, plaintiff contends that, in any event, the indemnity provision cannot, under applicable Tennessee law, be construed to require indemnity for defendant's own negligence.

Plaintiff relies on the Seventh Circuit holding in *Alford* v. *Major*, 470 F.2d 132 (7th Cir. 1972) that an indemnity

provision such as this one cannot be enforced since it is in violation of the aforesaid I.C.C. regulation. Defendant relies on the Fifth Circuit holding in *Allstate Ins. Co.* v. *Alterman Transport Lines, Inc.*, 465 F.2d 710 (5th Cir. 1972) that such an indemnity provision is enforceable.* The *Allstate* decision in the Fifth Circuit was rendered before the decision of the Court of Appeals for the Seventh Circuit in *Alford* but after the decision of the District Court in *Alford* holding the indemnity provision unenforceable and it discusses the District Court's opinion. It purports to distinguish the District Court's holding by pointing out that in *Alford* there had been a ". . . *prima facie* violation of 49 C.F.R. § 1057.4(a)(4) because the lessee allowed the lessor to retain full control over the truck and the driver during the term of the lease." This does not appear to be a proper basis for distinguishing *Alford*, as will appear from the opinion of the Court of Appeals in that case. In that opinion it is made clear that the control in the lessor was contended by the lessee to be a justification for the indemnity provision, and the Court held that it was not a justification. Thus the control in the lessor not only was not a basis for distinguishing the District Court result in *Alford*, but on the contrary, the Court of Appeals in *Alford* reached the conclusion that the indemnity provision was void in spite of the control in the lessor.

Plaintiff also relies on *Carolina Freight Carriers Corp.* v. *Pitt County Transp. Co.*, 358 F.Supp. 1177 (E.D. Va. 1973), which follows the holding in *Alford*, and plaintiff further relies on *Denver Midwest Motor Freight, Inc.* v. *Busboom Truck, Inc.*, 190 Neb. 231, 207 N.W.2d 368 (1973), which discusses both *Alford* and *Allstate* and follows the

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* It should be noted that in a more recent decision the Fifth Circuit, dealing with a closely related problem, cited the Seventh Circuit opinion as authority. *Simmons* v. *King*, 478 F.2d 857, 867 (5th Cir. 1973).

holding in *Alford*. Defendant also relies on *Aetna Casualty and Surety Co.* v. *Security Ins. Co.*, 267 A.2d 582 (Del. Supr. 1970), which supports its position and relies on *Allstate Ins. Co.* v. *General Fire & Casualty Co.*, 348 F.Supp. 682 (E.D. Pa. 1972), which does not seem to deal with this question.

We conclude that plaintiff's position is better supported by the authorities and seems to be more in line with the policy basis for the involved I.C.C. regulations.

With respect to plaintiff's alternative contention that the indemnity provision cannot, under Tennessee law, be construed to require indemnity to defendant for its own negligence, plaintiff relies on *Brogdon* v. *Southern Railway Co.*, 384 F.2d 220 (6th Cir. 1967) and *Eades* v. *Union Railway Co.*, 396 F.2d 798 (6th Cir. 1968). These decisions rely on *Kroger Co.* v. *Giem*, 215 Tenn. 459, 387 S.W.2d 620 (1964), and held that an indemnity provision could not under Tennessee law be construed to apply to the indemnitee's own negligence unless such was clearly expressed. This Court would agree that, applying such standard, the indemnity provision here does not meet this test and that therefore defendant would not be entitled to indemnity for its own negligence. However, the more recent Tennessee case of *Kellogg Co.* v. *Sanitors, Inc.*, ... Tenn. ....., 496 S.W.2d 472 (1973) throws at least some doubt on the Tennessee law in this area. Since this Court has concluded that the involved indemnity provision is void as being against public policy, we will not reach a conclusion as to this alternative contention.

A declaratory judgment will be prepared for entry.

ENTER this 19th day of February, 1974.

/s/ Bailey Brown
Chief Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Civil Action NO. C-73-354

JONES TRUCK LINES, INC.,
Plaintiff,

vs.

RYDER TRUCK LINES, INC. and AMERICAN
CASUALTY COMPANY,
Defendants.

DECLARATORY JUDGMENT

(Filed February 21, 1974)

This cause came on to be heard upon complaint, as amended, of plaintiff, Jones Truck Lines, Inc., answers thereto of defendants, Ryder Truck Lines, Inc. and American Casualty Company, testimony of witnesses in open Court, exhibits, and the entire record in this cause, from all of which the Court, after hearing argument of counsel and considering memorandum briefs filed in the cause, finds:

(1) This Court has jurisdiction over the parties and subject matter.

(2) This is a proper case for declaratory judgment under 28 U. S. C. 2201 and Rule 57, Rules of Civil Procedure.

(3) The indemnity provisions of "One-Way Lease Agreement" dated February 20, 1973 (copy of which is

Exhibit "E" to complaint), in favor of defendant, Ryder Truck Lines, Inc., (Lessee) and against plaintiff, Jones Truck Lines, Inc., (Lessor), are void as being against public policy as contained in Title 49 C. F. R. Section 1057.4 (a) (4); all in accordance with "Memorandum Decision" of the Court filed in this cause February 19, 1974.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED:

1. That the indemnity provisions in said "One-Way Lease Agreement" (Exhibit "E" to complaint of plaintiff) in favor of defendant, Ryder Truck Lines, Inc., (Lessee), and against plaintiff, Jones Truck Lines, Inc., (Lessor), are void as against public policy and, therefore, unenforceable;

2. That the exclusive responsibility between plaintiff, on the one hand, and defendants, on the other hand, for all claims resulting from the accident described in the complaint and which occurred February 21, 1973 in Morehouse Parish, Louisiana, while Orin Taylor was driving vehicle described in said "One-Way Lease Agreement" is on defendants.

Costs are adjudged against defendants.

Bailey Brown
Judge

Approved for Entry:

/s/ Thomas R. Prewitt
Attorney for Plaintiff

/s/ Albert McRae
Attorney for Defendants

APPENDIX C

No. 74-1443

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

JONES TRUCK LINES, INC.,
Plaintiff-Appellee,

v.

RYDER TRUCK LINES, INC. and AMERICAN CASUALTY COMPANY,
Defendants-Appellants.

On Appeal from the United States District Court for the Western District of Tennessee, Western Division.

Decided and Filed December 13, 1974

Before: WEICK, CELEBREZZE and MILLER, Circuit Judges.

MILLER, Circuit Judge. This appeal is from the judgment of the district court in a declaratory judgment action, declaring and adjudging an indemnification provision in a one-way motor carrier lease agreement void and unenforceable as against public policy and in violation of Interstate Commerce Commission Regulations.

The operative facts are substantially undisputed. Jones, a motor vehicle common carrier, accepted in Kansas City, Missouri, certain goods for transportation from that point to West Monroe, Louisiana. Jones had not been authorized by the I.C.C. to operate in the State of Louisiana and it was

therefore necessary for it to make arrangements with some other carrier having a Louisiana authorization to complete the transportation of the goods from Memphis, Tennessee, to the destination point in Louisiana. The goods were transported by Jones in a truck which it had leased from the owner, one Orin Taylor, to Memphis, Tennessee. On this portion of the trip Taylor was also the driver of the vehicle. At Memphis, a proper inspection of the vehicle was made to comply with I.C.C. regulations.[1] The shipment was then transferred under a lease agreement between Jones and Ryder for completion of the trip to Louisiana. This lease, dated February 20, 1973, provided for the leasing of the equipment from Jones Truck Lines, Inc., as lessor, to Ryder Truck Lines, Inc., as lessee. It further provided for the transportation of the goods by use of the leased equipment from Memphis to the destination point.

The lease was actually signed by Taylor, at Memphis on behalf of the lessor Jones, acting as its agent. Since the lease contemplated that Taylor was to continue to operate the vehicle, he became Ryder's agent while driving it to complete the journey. He received the freight bills specifying the route he was to take to West Monroe and indicating that Ryder was the proper party to be contacted in case of an emergency. He actually took a route, however, contrary to that specified in the freight bill, a fact of no significance here.[2] In the course of the trip, he was involved in an accident from which litigation ensued in the Louisiana state courts. After the accident, Ryder ac-

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1. We find Jones' contention that I.C.C. Regulations were not complied with in the inspection of the equipment at Memphis to be without merit.

2. We treat the departure of the driver from the specified route as of no significance on the present appeal as it is neither argued before us by the parties nor discussed by the district court in its opinion.

knowledged its responsibility to third parties for the acts of Taylor as its agent, although it did not concede liability. Subsequently, Jones instituted the present action to have the indemnification provision of the one-way lease agreement declared void and unenforceable. The provisions of the Jones-Ryder lease pertinent in this case are as follows:

> It is understood that the leased equipment under this agreement is in the exclusive possession, control, and use of the authorized carrier Lessee and that the Lessee assumes full responsibility in respect to the equipment it is operating to the public, the shippers and the Interstate Commerce Commission. It is agreed that Lessor will carry acceptable Public Liability and Property Damage insurance. Lessor agrees to reimburse and otherwise indemnify Lessee for any and all losses sustained by Lessee resulting from the use of the aforesaid equipment.
>
> . . . .
>
> . . . Lessor indemnifies Lessee against any loss resulting from the injury or death of . . . drivers.
>
> . . . .
>
> The Lessor shall save the Lessee harmless from any loss, damage or happening giving rise to claims on the part of the shippers . . . .

It is Jones' contention that the indemnification provision in the lease is in conflict with Title 49, C.F.R. § 1057.4(a) which provides:

> **§ 1057.4 Augmenting equipment.**
>
> Other than equipment exchanged between motor common carriers in interchange service as defined in § 1057.5, authorized carriers may perform authorized

> transportation in or with equipment which they do not own only under the following conditions:
>
> (a) *Contract requirements.* The contract, lease, or other arrangement for the use of such equipment:
>
> . . . .
>
> (4) *Exclusive possession and responsibilities.* Shall provide for the exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of said contract, lease or other arrangement, except: [exceptions not relevant to this case]

The argument is that these regulations established a public policy obligating Ryder as the lessee of the equipment to assume "complete" responsibility for Taylor's operation of the leased vehicle in Louisiana, whereas the indemnification provision of the lease would exempt Ryder from such responsibility and place the ultimate loss on Jones.

This argument, however, flies in the face of the express terms of the indemnification agreement which provides that the equipment under the lease "is in the exclusive possession, control, and use of the authorized carrier Lessee and that the Lessee assumes full responsibility in respect to the equipment it is operating to the public . . . ." This provision is in conformity with the requirement of the regulation that a lease of equipment "shall provide for the exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the Lessee for the duration of said contract, lease, or other arrangement . . . ."

The authorities are in accord that an indemnification agreement in a one-way lease providing for the complete

assumption of responsibility for the operation of the equipment by the lessee for the duration of the term of the lease is not violative of Title 49, C.F.R. 1057.4(a). Thus the Fifth Circuit in *Allstate Insurance Co.* v. *Alterman Transport Lines, Inc.*, 465 F.2d 710 (5th Cir. 1972), held that the regulation was not violated by an indemnification clause requiring a lessor in a one-way lease agreement to reimburse the lessee for all losses arising out of the operation of the lease. In support of this view the court pointed out that such an indemnification provision under which the parties freely contract as to which of them would ultimately be responsible for any damages caused to a third party is not materially different from a contract of liability insurance covering a loss caused by the fault or negligence of the insured party. Similarly, the Fourth Circuit in *Carolina Freight Carriers Corp.* v. *Pitt County Transportation Co.*, 492 F.2d 243 (4th Cir. 1974), petition for certiorari filed 43 U.S.L.W. 3067, (August 13, 1974) (No. 73-1750) in upholding an indemnification provision comparable to the one now under consideration, observed that there was nothing in the lease agreement purporting to relieve the lessee from its responsibility to third parties for damages arising from the operation of the leased equipment. On the contrary, as in the present case, the agreement expressly provided that the lessee accepted full responsibility. The Fourth Circuit in its opinion further observed that a voluntary distribution of the ultimate costs among various parties does not in any way circumvent or contravene the assumption by one of the parties of full responsibility to the public for any injury that might be inflicted.

The ruling of the Seventh Circuit in *Alford* v. *Major*, 470 F.2d 132 (7th Cir. 1972), that the indemnification agreement considered in that case contravened the I.C.C.

regulation is not in conflict with the rulings of the Fourth and Fifth Circuits. This is true for the obvious reason that in *Alford* v. *Major, supra,* the indemnification agreement itself permitted the lessor to retain full control over the truck and driver during the full term of the lease in direct violation of the applicable I.C.C. regulation which specifically requires that the *exclusive* control of the equipment shall be vested in the lessee for the duration of the lease.

That the lessor in the present case agreed to reimburse the lessee for any losses in no way impairs the public's right of recourse against Ryder for damages caused by its operation of the truck in Louisiana. On the contrary, the indemnification agreement would appear to have the effect of strengthening the possibility of recovery by a third party in that it would provide another source or "pocket" from which a recovery could be obtained. The argument that the indemnification provision would have the effect of making Ryder less careful in its operation of the vehicle in that it would enable Ryder to transfer its losses to Jones is unconvincing. The uncertainties and inconveniences attendant upon enforcement of such an indemnification provision are alone sufficient to motivate the indemnitee to pursue a course of caution and prudence in its operations. Another factor which would normally cause a carrier to avoid accidents or injuries to third persons would be its desire to establish a name for conducting a safe operation to protect itself against a reputation for carelessness or indifference to the rights of others.

We are not persuaded by Jones' alternative argument, not resolved by the district court, that the contract of indemnity before us cannot be construed to relieve Ryder from the consequences of its own acts of negligence. On this issue, it appears to be conceded that Tennessee law

controls since the lease agreement was executed and the equipment was transferred to the lessee in that state. In its most recent pronouncement on the subject, the Supreme Court of Tennessee has stated that there is no rule of public policy prohibiting the indemnitee from contracting for indemnification on account of its own acts of negligence but that a contract will not be so construed unless it was clearly intended to have that effect. *Kellogg* v. *Sanitors, Inc.*, 496 S.W.2d 472 (Sup. Ct. of Tenn. 1973). The court quoted with approval the following statement of the rule from 41 Am Jur. 2d *Indemnity*, Sec. 13:

> A contract of indemnity purporting or claimed to relieve one from the consequences of his failure to exercise ordinary care must be strictly construed. Accordingly, it is frequently stated as the general rule that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from his own negligent acts unless such intention is expressed in clear and unequivocal terms, *or unless no other meaning can be ascribed to it.* Mere general, broad, and seemingly all inclusive language in the indemnifying agreement has been said not to be sufficient to impose liability for the indemnitee's own negligence. (emphasis supplied by Tennessee court) 496 S.W.2d at 474.

Applying this rule in the present case, we think it is clear from the indemnity contract that the parties intended that Ryder (indemnitee) should be reimbursed for all losses which it sustained resulting from its use of the equipment and while under its exclusive dominion and control. In unequivocal terms the contract provides that the equipment shall be in the "exclusive possession, control and use" of the lessee and that the lessee assumes full responsibility in respect to the equipment "to the public."

The lessor, on the other hand, agrees to carry acceptable Liability and Property Damage insurance and "to reimburse and otherwise indemnify Lessee for any and all losses sustained by Lessee resulting from the use of the aforesaid equipment." Clearly this language is susceptible of no meaning other than that the lessor was to indemnify the lessee for all losses sustained by it and resulting from its operation and use of the equipment, whether caused by the lessee's own acts of negligence or otherwise.

The judgment of the district court is therefore reversed and the action is remanded to that court for entry of a declaratory judgment consistent with this opinion.

APPENDIX D

49 C.F.R. § 1057.4 Augmenting equipment.

Other than equipment exchanged between motor common carriers in interchange service as defined in § 1057.5, authorized carriers may perform authorized transportation in or with equipment which they do not own only under the following conditions:

(a) *Contract requirements.* The contract, lease, or other arrangement for the use of such equipment:

(1) *Parties.* Shall be made between the authorized carrier and the owner of the equipment.

(2) *Written contract required.* Shall be in writing and signed by the parties thereto, or their regular employees or agents duly authorized to act for them in the execution of contracts, leases, or other arrangements.

(3) *Minimum duration of 30 days when operated by lessor.* Shall specify the period for which it applies, which shall be not less than 30 days when the equipment is to be operated for the authorized carrier by the owner or employee of the owner; excepting:

(i) *Equipment used in agricultural or perishable operations.* That subject to the proviso in (c) of this subdivision such 30-day minimum period shall not apply to equipment, with driver:

(*a*) Where the motor vehicle so to be used is that of a farmer or a cooperative association or a federation of cooperative associations, as specified in section 203 (b) (4a) or (5) of the Interstate Commerce Act, or is that of a private carrier of property by motor vehicle as defined in section 203(a)(17) of the Act and is used regularly in the

transportation of property of a character embraced within section 203(b)(6) of the Act or perishable products manufactured from perishable property of a character embraced within section 203(b)(6), and such motor vehicle is to be used by the motor carrier in a single movement or in one or more of a series of movements, loaded or empty, in the general direction of the general area in which such motor vehicle is based; or

(*b*) Where the motor vehicle so to be used is one which has completed a movement covered by section 203 (b)(6) of the Act and such motor vehicle is next to be used by the motor carrier in a loaded movement in any direction, and/or in one or more of a series of movements, loaded or empty, in the general direction of the general area in which such motor vehicle is based; and

(*c*) *Provided,* In either instance that prior to the execution of the lease, the authorized carrier receives and retains a statement signed by the owner of the equipment, or someone duly authorized to sign for the owner, authorizing the driver to lease the equipment for the movement or movements contemplated by the lease, certifying that the equipment so leased meets the qualifications enumerated in (a) or (b) of this subsection, and specifying the origin, destination, and the time of the beginning and ending of the last movement which brought the equipment within the purview of this subsection.

(ii) *Automobile and tank truck carriers.* That such 30-day minimum period shall not apply to equipment owned or held under lawful lease by an authorized automobile carrier or tank truck carrier and used in the transportation of motor vehicles or commodities in bulk, respectively, when leased or subleased to other such authorized carriers.

(iii) *Ice and snow control purposes.* That such 30-day minimum period shall not apply to dump equipment leased or subleased for use in transporting salt and calcium chloride, in bulk, for ice and snow control purposes, during the period from November 1 to April 30, both inclusive, of each year.

(4) *Exclusive possession and responsibilities.* Shall provide for the exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of said contract, lease or other arrangement, except:

(i) *Lessee may be considered as owner.* Provision may be made therein for considering the lessee as the owner for the purpose of subleasing under these rules to other authorized carriers during such duration.

(ii) *Household goods, carriers; intermittent operations under long-term lease.* When entered into by authorized carriers of household goods, for the transportation of household goods, as defined by the Commission, such provisions need only apply during the period the equipment is operated by or for the authorized carrier, lessee.

(5) *Compensation to be specified.* Shall specify the compensation to be paid by the lessee for the rental of the leased equipment.

(6) *Duration to be specific.* Shall specify the time and date or the circumstances on which the contract, lease, or other arrangement begins, and the time or the circumstances on which it ends. The duration of the contract, lease or other arrangement shall coincide with the time for the giving of receipts for the equipment as required by paragraph (b) of this section; and

(7) *Copies of lease and their distribution; copy to be carried on vehicle.* Shall be executed in triplicate; the

original shall be retained by the authorized carrier in whose service the equipment is to be operated, one copy shall be retained by the owner of the equipment, one copy shall be carried on the equipment specified therein during the entire period of the contract, lease, or other arrangement, unless a certificate as provided in paragraph (d) (2) of this section is carried in lieu thereof.

(b) *Receipts for equipment to be specific.* When possession of the equipment is taken by the authorized carrier or its regular employee or agent duly authorized to act for it, said carrier, employee or agent shall give to the owner of the equipment, or the owner's employee or agent a receipt specifically identifying the equipment and stating the date and the time of day possession thereof is taken; and when the possession by the authorized carrier ends; it or its employee or agent shall obtain from the owner of the equipment, or its regular employee or agent duly authorized to act for it, a receipt specifically identifying the equipment and stating therein the date and the time of day possession thereof is taken.

(c) *Safety inspection of equipment by the authorized carrier.* It shall be the duty of the authorized carrier, before taking possession of equipment, to inspect the same or to have the same inspected by a person who is competent and qualified to make such inspection and has been duly authorized by such carrier to make such inspection as a representative of the carrier, in order to insure that the said equipment complies with the Motor Carrier Safety Regulations of the Federal Highway Administration of the Department of Transportation. The person making the inspection shall certify the results thereof on a report in the form hereinafter set forth, which report shall be retained and preserved by the authorized carrier, and if his inspection discloses that the equipment does not comply

with the requirements of the said safety regulations, possession thereof shall not be taken. When such an inspection has been made, the authorized carrier or an officer or partner thereof, or a safety director or other supervisory employee responsible for safety compliance, shall certify on the inspection report that the person who made the inspection, whether an employee or person other than an employee, is competent and qualified to make such inspection and has been duly authorized to do so by such carrier as its representative. When equipment other than a power unit is leased, a form of report applicable to such equipment may be used.

REPORT OF VEHICLE INSPECTION

Description of vehicle:

Make .....

Model .....

Year .....

Serial No. .....

Type: Tractor .....

Semitrailer .....

Trailer .....

License plate: No. .....

State .....

Owner's name .....

Name of authorized carrier .....

Indicate in the proper column the result of the inspection of each item listed:

Item	Not defective	Defective	Description of defect
Body			
Brakes			
Cooling system			
Drive line			
Emergency equipment			
Engine			
Exhaust			
Fuel system			
Glass			
Horn			
Leaks			
Lights (state which)			
Reflectors			
Speedometer			
Springs			
Steering			
Tires			
Wheels			
Windshield wiper			

Any other items requiring attention .....

.....

I hereby certify that on the ..... day of .....
I carefully inspected the equipment described above and that this is a true and correct report of the result of such inspection.

.....

(Signature of person making inspection)

I hereby certify that on the date stated above the person who made the inspection covered by this report was competent and qualified to make such inspection and was duly authorized to make such inspection as a representative of (Name of authorized carrier) .....

.....

(Signature of carrier, partner, officer, safety director, or other supervisory employee responsible for safety compliance.)

Date .....

(d) *Identification of equipment as that of the authorized carrier.* The authorized carrier acquiring the use of equipment under this rule shall properly and correctly identify such equipment during the period of the lease, contract, or other arrangement in accordance with the Commission's requirements in Part 1058 of this chapter (Identification of Vehicles). If a removable device is used to identify the acquiring authorized carrier as the operating carrier, such device shall be on durable material such as wood, plastic, or metal, and bear a serial number in the acquiring authorized carrier's own series so as to keep proper record of each of the identification devices in use.

(1) *Identification to be removed when lease terminated.* The authorized carrier operating equipment under this part shall remove any legend, showing it as the operating carrier, displayed on such equipment, and shall remove any removable device showing it as the operating carrier, before relinquishing possession of the equipment.

(2) *Certified statement may be carried on vehicle in lieu of lease.* Unless a copy of the lease, contract or other arrangement is carried on the equipment, as provided in paragraph (a)(7) of this section, the authorized carrier or

its regular employee or agent shall prepare a statement certifying that the equipment is being operated by it, which shall specify the name of the owner, the date of the lease, contract or other arrangement, the period thereof, any restrictions therein relative to the commodities to be transported, and the location of the premises where the original of the lease, contract or other arrangement is kept by the authorized carrier, which certificate shall be carried with the equipment at all times during the entire period of the lease, contract, or other arrangement.

(e) *Driver of equipment to be in compliance with safety regulations.* Before any person other than a regular employee of the authorized carrier is assigned to drive equipment operated under this part, it shall be the duty of the authorized carrier to make certain that such driver is familiar with, and that his employment as a driver will not result in, violation of any provision of the Motor Carrier Safety Regulations of the Federal Highway Administration of the Department of Transportation.

(f) *Record of equipment to be maintained; shipping documents to identify the authorized carrier.* The authorized carrier utilizing equipment operated under this part for periods of less than 30 days shall prepare and keep a manifest or other documents covering each trip for which the equipment is used in its services, containing the name and address of the owner of such equipment; point of origin, the time and date of departure, the point of final destination, and the authorized carrier's serial number of any identification device affixed to the equipment. During the time that equipment subject to this part is operated there shall be carried with the equipment, bills of lading, waybills, freight bills, manifests, or other papers identifying the lading, and containing the foregoing information, which shall clearly indicate that the transportation of the prop-

erty carried is under the responsibility of the authorized carrier, which papers shall be preserved by the authorized carrier. This section shall also apply with respect to vehicles leased for periods of 30 days or more unless the required information is kept at a terminal or office as a part of the records of the authorized carrier.

[32 F.R. 20056, Dec. 20, 1967, as amended at 33 F.R. 2848, Feb. 10, 1968]

One-Way Lease Agreement

NO. 8'0-73

SIGN Nos. 5238

8'0-73

ORIGIN TERMINAL COPY

WHEREAS, on date 2/20/73, Jones Truck Lines, Inc., Jacksonville, Fla.
hereinafter called the Lessee, is engaged in the business of transporting property by motor vehicle, AND WHEREAS,

Jones Truck Lines, Inc.		Orin Taylor
Owner		Driver
Springfield,	Check equipment registration card to determine owner	Kansas City, Kans.
Address		Address

hereinafter called the Lessor, is the owner and/or driver with authority to lease the following described vehicles:

Tractor	Chevrolet	1972	V13521	Ark. J 10223
	Make	Year	Serial	State and License No.
Semi-Trailer	Fruehauf	1972	69593	[illegible] 507
	Make	Year	Serial	State and License No.

IN CONSIDERATION OF THE SUM OF (inclusive of driver's wages) $_____ or 75 % or $_____ per ton of load revenue it is hereby agreed that the Lessor shall lease above described vehicles to Lessee for use in loading and transporting such property as Lessee may require for the following trip:

To start at Jones Truck Lines, Inc., Memphis, Tenn.
Shipper — City — State

To terminate at R. E. Rhodes, West Monroe, La.
Consignee — City — State

Delivery not later than { 2/20/73 Date / 2/21/73 Date }

It is understood that the leased equipment under this agreement is in the exclusive possession, control, and use of the authorized carrier Lessee and that the Lessee assumes full responsibility in respect to the equipment if is operating to the public, the shippers, and the INTERSTATE COMMERCE COMMISSION. It is agreed that Lessor will carry acceptable Public Liability and Property Damage insurance. Lessor agrees to reimburse and otherwise indemnify Lessee for any and all losses sustained by Lessee resulting from the use of the aforesaid equipment.

It is agreed that this agreement shall cover the period of time from commencement of loading the motor vehicle to the termination of the unloading.

Lessor is to pay driver's salary, compensation coverage, and all taxes, state or federal, based on payroll. Lessor indemnifies Lessee against any loss resulting from the injury or death of such drivers.

The authorized carrier Lessee agrees to properly and correctly identify with signs the leased equipment in accordance with the I.C.C. requirements in Ex Parte MC 43. Lessor will forfeit $10.00 of load revenue if signs are not returned to Lessee immediately upon completion of trip.

The Lessor agrees to deliver to the Lessee the above equipment in good running order and condition; maintain the same in good working condition, furnishing all necessary oil, gasoline, tires, and repairs for the operation of said equipment and to pay all other expenses incident to such operation.

All taxes of any nature whatsoever, and all licenses and fines that may be assessed against the equipment while same is being used by the Lessee, where such fines are caused through improper equipment and/or operation of the property leased, shall be deducted from the amount due the Lessor under this agreement.

In the event that equipment referred to herein is not in proper mechanical condition or for any other reason is deemed inadequate to the Lessee, then the Lessee shall have the authority to transfer any shipment from this equipment and handle same according to the best judgment of the Lessee. All charges such as delivery and storage, incident to the rehandling of such shipments shall be deducted from the amount paid the Lessor for the use of the equipment under this agreement.

The Lessor shall save the Lessee harmless from any loss, damage or happening giving rise to claims on the part of the shippers, and the Lessee shall withhold payment of any and all sums then or thereafter due the Lessor, to the extent of such expenses and claims until the determination of such expense and valid claims, which amounts shall then be deducted to the satisfaction thereof.

Lessee shall not be liable for the loss of, or damage to, the aforesaid equipment, however caused, while in use under the terms of this lease.

Lessee agrees to sign the receipt for possession of the above described equipment and upon completion of the trip described above the Lessee will sign the receipt for the equipment as having been returned to his possession.

It is agreed that Lessor at the time of payment from Lessee is requested, present to Lessee the final payment copy of the trip lease, shipping order or copy of bill of lading, a signed clear receipt from consignee showing time of delivery, log sheets, and the removable identification signs showing the name of the Lessee, and other items listed on reverse side of this lease.

Lessor hereby agrees further to maintain his equipment in a good and efficient manner, observe all safety and other requirements of the I.C.C. and all other regulatory bodies having jurisdiction and to pay all fines due to overload, overlength, speeding or other willful acts of negligence in the operation of described vehicles, lack of permits or plates or any other fines assessed against him for any cause.

The driver was given a physical examination by Dr._____ Expiration Date_____ and declared physically fit in accordance with S 191.2 and the physical examination procedure prescribed by the Motor Carriers Safety Regulation of the Interstate Commerce Commission. The doctor's certification and/or physical examination report No._____, dated_____, on file at General Office, or is attached to the Pink Copy of this lease.

IN WITNESS WHEREOF, the parties hereto have signed this lease in Quadruplicate this 20 day of Feb. 19 73

Lessor Jones Truck Lines, Inc.

X Driver's Signature Orin Taylor

Driver's Social Security No. [illegible]

Chauffeur's License No. and State [illegible] Kans.

Ohio HUT No._____

Lessee Jones Truck Lines, Inc.

By M. L. Rhodes

Terminal_____ No._____

This load is reported on loading sheet dated_____

RECEIPT BY OWNER (LESSOR)

The undersigned Owner hereby acknowledges the receipt of the equipment from Carrier in acceptable condition on the _____ day of _____, 19____ at _____ o'clock (a.m.)(p.m.), this terminating the above set forth lease.

_____, Owner

Driver (Agent) Sign ☞ _____

RECEIPT BY CARRIER (LESSEE)

The undersigned Carrier hereby acknowledges the receipt of the equipment above described from Owner this Feb 73 2:30 P day of _____, 19____, at _____ o'clock ____M.

Jones Truck Lines, Inc., Lessee-Carrier

Lessee (Agent) Sign ☞ M. Rhodes

VEHICLE REPORT BY DRIVER ON COMPLETION OF TRIP

My vehicle is in good condition and meets all the I.C.C. requirements ☐. The log recordings on other side of this sheet are true and correct ☐. My vehicle has the following defects: _____

Supreme Court, U. S.
FILED
FEB 19 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-973

JONES TRUCK LINES, INC.,
Petitioner,

vs.

RYDER TRUCK LINES, INC. and AMERICAN CASUALTY COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1974

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vs.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

On page 2 of the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit the "Question Presented" is a correct statement of the issue.

ADDITIONAL STATEMENT OF THE CASE

References prefixed by the letter "R" are to pages of the Appendix filed in the Court of Appeals for the Sixth Circuit.

The petitioner's statement of facts is essentially correct but incomplete and is supplemented herewith.

The petitioner Jones Truck Lines, Inc. (hereinafter referred to as "Jones") is an Arkansas corporation. The respondent Ryder Truck Lines, Inc. (hereinafter referred to as "Ryder") is a Florida corporation doing business in the State of Tennessee. The respondent American Casualty Company (hereinafter referred to as "Surety") is a Pennsylvania corporation which was the surety on certain obligations entered into by Ryder for the purpose of complying with I. C. C. Regulations and certain regulations of the State of Louisiana. The positions of Ryder and Surety in this case are identical, and Surety's only connection with the litigation is by virtue of its surety relationship.

On February 20, 1973, in accordance with a longstanding practice, Jones and Ryder, both corporations operating under I. C. C. Regulations, entered into a one-way lease agreement for the purpose of moving certain goods from Kansas City to Louisiana (Trial Exhibit 3). Jones had accepted a shipment of goods from Owens Corning in Kansas City for movement to West Monroe, Louisiana. Since Jones was not authorized to operate in the State of Louisiana, it was necessary to enter into a one-way lease agreement. In this case a representative of Jones contacted Ryder's agent by long distance telephone, and the agreement was made (R. 82, 83). The shipment of goods was moved from Kansas City, Missouri to Memphis, Tennessee by vehicle exclusively leased to Jones Truck Lines

and operated by its owner, one Orin Taylor (Trial Exhibit 1, R. 107). When the shipment of goods arrived in Memphis, Ryder's agent Mildred Rodocker, in accordance with advance notice from Jones, had prepared the necessary paperwork to comply with the I. C. C. Regulations. This included the preparation of the one-way lease agreement in question (Trial Exhibit 3), the Ryder freight bill (Trial Exhibit 4), the Louisiana fuel certificate and the placard to place on the side of the truck giving the Ryder I. C. C. number and designation (R. 100-104).

When Taylor arrived in Memphis, he presented to Ryder's agent all of the required documentation including his physical examination report (Trial Exhibit 6), his Driver Qualification (Trial Exhibit 7) and the Driver Time Worked Statement (Trial Exhibit 8; R. 98-100).

Although Jones contended in the Complaint that Taylor was not authorized to sign the lease agreement (R. 6, 9), at the trial of the cause this contention was discarded and the authority admitted (R. 88, 89). Taylor signed the one-way lease agreement (Trial Exhibit 3) as agent for Jones.

When Rodocker was contacted by Jones initially, the truck driven by Taylor was already en route from Kansas City to Memphis. Consequently, the transaction for a transfer of control and responsibility of the equipment from Jones to Ryder took place late in the evening between 11:00 P.M. and midnight in Memphis. In accordance with I. C. C. Regulations an inspection of the vehicles was accomplished by agent Rodocker. Inspections were ordinarily made by one Harry Marshall, but his business closed at 8:00 P.M. Consequently, agent Rodocker who was experienced in such inspections did make the inspection and signed Marshall's name to the inspection certificate located on the back of the trip lease just as she had done on

prior occasions as agent for Jones (Trial Exhibit 5). Trial Exhibit 5 is the back of Trial Exhibit 3 which is the lease itself.

Agent Rodocker also served as agent for Jones (R. 80). It is undisputed, of course, that on this occasion she was acting as agent for Ryder. Rodocker had made inspections for Jones on other occasions, and, in fact, had signed inspection reports also using Harry Marshall's name (R. 85, 86, 94-97). The Jones vice-president B. J. Wiseman testified that in making inspections for Jones all he required Rodocker to do was have the equipment inspected in a qualified fashion whether she did it by herself or whether she arranged for a mechanic to do it for her (R. 128). The Court of Appeals found that Jones' contention that I. C. C. Regulations were not complied with in the inspection of the equipment at Memphis to be without merit (See note 1, page A7 of Petition for Certiorari).

The driver Taylor was furnished with the freight bill by Ryder which specified his route from Memphis to West Monroe, Louisiana was by way of Jackson, Mississippi, on Interstate I-55 and I-20, consecutively. The freight bill also specified that Ryder was to be called in case of emergency, and the area code and telephone number of Ryder alone appears thereon (R. 101; Trial Exhibit 4). Contrary to the requirements of that freight bill, Taylor chose an alternate route and was involved in an accident in North Louisiana, out of which certain litigation has arisen in the State of Louisiana (R. 22-26). Following the accident it was the representative of Ryder who contacted the driver, and it was to that individual, rather than an agent of Jones that the driver surrendered his pertinent papers (R. 115, 116).

Ryder from the outset has and does stand ready to defend that litigation or any other suits arising out of the

aforesaid accident but insists that the indemnity provision of the lease is enforceable.

The lease agreement between Jones and Ryder (page A23, Appendix E, Petition for Certiorari) provides in part:

> "It is understood that the leased equipment under this agreement is in the exclusive possession, control, and use of the authorized carrier Lessee and that the Lessee assumes full responsibility in respect to the equipment it is operating to the public, the shipper, and the INTERSTATE COMMERCE COMMISSION. It is agreed that Lessor will carry acceptable Public Liability and Property Damage Insurance. Lessor agrees to reimburse and otherwise indemnify Lessee for any and all losses sustained by Lessee resulting from the use of the aforesaid equipment."

A virtually identical indemnity provision also appeared in such leases utilized by Jones (R. 64).

ARGUMENT

It is contended that the Petition for a Writ of Certiorari should be granted since the decision by the Court of Appeals for the Sixth Circuit in this cause is in conflict with the decision of the Court of Appeals for the Seventh Circuit in *Alford* v. *Major*, 470 F.2d 132 (1972). It is conceded that the opinion in the instant case is consistent with the Fourth Circuit opinion in *Carolina Freight Carriers Corporation* v. *Pitt County Transportation Company*, 492 F.2d 243 (C.A. Fourth, 1974) and is consistent with the Fifth Circuit opinion in the case of *Allstate Insurance Company* v. *Alterman Transport Lines, Inc.*, 465 F.2d 710 (C.A. Fifth, 1972).

The basic question decided by the District Court and the Court of Appeals and the one which petitioner contends the Supreme Court should consider is: Whether the requirement of I. C. C. Regulations 49 C.F.R. 1057.4 calling for "exclusive possession, control and use of the equipment" is inconsistent with the indemnity agreement in question so as to make it void and unenforceable?

Following a collision between other vehicles and the truck designated in the one-way lease agreement between Jones and Ryder (page A23, App. E, Petition for Writ of Certiorari) Jones is taking the position that the indemnity agreement contained therein is unenforceable and has brought this declaratory judgment action. Jones contends that even though the vehicle had been leased to Ryder and even though Ryder had assumed exclusive possession, control and use, nevertheless, the indemnification agreement which calls for indemnification constitutes an evasion of the requirements of the said I. C. C. Regulation. It is the position of Ryder that the indemnification agreement not only is not an evasion of the requirements of the I. C. C. Regulation but, in fact, constitutes additional security for the public.

The petitioner Jones seeks a review in this Court on the grounds that the *Alford* case in the Seventh Circuit is in conflict with the previously-mentioned decisions from the Fourth, Fifth and Sixth Circuits which he contends correctly are in agreement with each other. It is the petitioner's position then that by virtue of the *Alford* case that the Seventh Circuit is in conflict with the Fourth, Fifth and Sixth Circuits on this issue and the Petition should be granted.

The respondents would show to the Court that there is no conflict and that *Alford* is clearly distinguishable. Since

there is no conflict in the decision of said Circuits, this Court should not grant the Petition.

The authorities cited by the petitioner give the history of the pertinent regulation and point out that prior to this control there was confusion with regard to the responsibility of the operation of such motor vehicles to the general public. It was the purpose of the aforesaid regulation to clarify this responsibility by requiring that where a lessee utilizes the services of a leased vehicle, that lessee must be exclusively responsible to the general public. This obviously prevented the confusion which existed prior thereto when each carrier would insist that the other was responsible to the detriment of third-parties. It must be kept in mind that regardless of the indemnity agreement herein the respondents at all times and now state that they assume any responsibility to the public required under Section 1057.4.

It is undisputed that this was a shipment under the provisions of Section 1057.4. We would call the Court's particular attention to the one-way lease agreement which is shown in the Appendix in the Petition for Certiorari at page A23. The pertinent language is:

> "Lessor agrees to reimburse and otherwise indemnify Lessee for any and all losses sustained by Lessee resulting from the use of the aforesaid equipment."

Prior to the foregoing quote and in the same paragraph it is stated:

> "It is understood that the leased equipment under this agreement is in the exclusive possession, control and use of the authorized carrier Lessee and that the Lessee assumes full responsibility in respect to the equipment it is operating to the public, the shipper, and the INTERSTATE COMMERCE COMMISSION."

It is clear then that by virtue of this agreement and from all of the evidence at the trial in the District Court it was agreed between the parties that the lessee Ryder did assume exclusive possession, control and use of the vehicle. Ryder directed the route to take. The driver was notified that if he got into any trouble he was to notify Ryder. After the accident the driver surrendered his papers to a representative of Ryder. At no time did Jones exercise or attempt to exercise any control over the vehicle or its driver after it came into the control of Ryder. It is clear then that the parties entered into an agreement consistent with the I. C. C. Regulations cited in Appendix D (page A14) of the Petition for Certiorari.

Does *Alford* disagree with *Alterman, Carolina* and the decision of the Sixth Circuit in this case? In the *Alford* case an indemnifying clause in a trip lease was held unenforceable. A study of the facts of the case, however, shows an entirely different circumstance. As a matter of fact, there the lessee (Major):

> ". . . contends that its indemnification clause may be enforced since the actual care, custody and control of the truck *remained with the lessor carrier* even though Major, consistent with ICC Regulations, assumed full responsibility therefore to the general public. It is Major's position that the ICC Regulations recognize and indeed permit the lessor to furnish its driver to the lessee and that, therefore, these regulations implicitly acknowledge the practical fact that in this situation the lessee carrier has no actual control over the driver furnished by the lessor." (Emphasis added).

On the other hand the respondent-lessee-Ryder in this case insists that the indemnification clause should be enforced since the *exclusive possession, control and use of*

the truck were exercised by the lessee carrier consistent with the regulation under discussion. All of the proof in the District Court supports this proposition. The contention of the lessor is that regardless of who had control the indemnifying clause is not enforceable.

This distinction was clearly pointed out by the Sixth Circuit of the Court of Appeals in its opinion at page A10 of Appendix C in the Petition for Certiorari. Therein the Court stated:

> "The ruling of the Seventh Circuit in *Alford* v. *Major,* 470 F.2d 132 (7th Cir. 1972), that the indemnification agreement considered in that case contravened the I. C. C. regulation is not in conflict with the rulings of the Fourth and Fifth Circuits. This is true for the obvious reason that in *Alford* v. *Major,* supra, the indemnification agreement itself permitted the lessor to retain full control over the truck and driver during the full term of the lease in direct violation of the applicable I. C. C. regulation which specifically requires that the exclusive control of the equipment shall be vested in the lessee for the duration of the lease."

In *Carolina Freight Carriers* v. *Pitt County Transportation Company,* 492 F.2d 243 (C.A. Fourth, 1974) the agreement provided (at page 244) that:

> "Carolina Freight Carriers Corporation, Lessee, hereby acknowledges receipt of and leases from Pitt County Trucking Company, Lessor, of Farmville, North Carolina * * * for its exclusive possession, control and use, and assumes complete responsibility in respect thereto for the duration of this Motor Vehicle Trip Agreement . . ."

The Fourth Circuit decided therein that indemnification agreements similar to that under discussion are clearly enforceable and certainly was not in violation of either the "spirit or the letter of the I. C. C. Regulation."

In *Allstate Insurance Company* v. *Alterman Transport Lines, Inc.*, 465 F.2d 710 (C.A. Fifth, 1972) the release provided (at page 713 of the opinion) that:

> ". . . said vehicle shall be solely and exclusively under the direction and control of the lessee [Alterman] who shall assume full common carrier responsibility . . . for the operation of such vehicle."

The indemnfication agreement was there held enforceable since the lessee did assume full possession and control. It is the contention of the petitioner that the enforcement of such an agreement would avoid the requirements of the I. C. C. Regulations. This, of course, is not true. As a matter of fact the indemnifying agreement gives additional security to the general public. The execution of the indemnifying agreement does not in any respect negate the responsibility of the lessee-respondent-Ryder to third-parties. The I. C. C. Regulations set out in the lease agreement agreed to by both parties by signature of their respective agents clearly show that the lessee assumed exclusive possession and control, and it has at all times acknowledged its responsibility to said third parties. Since the agreement provides for additional security, the public has been further protected. As the Court stated in the *Alterman* case:

> "Turning to the indemnification clause itself we find nothing in the language of 49 C. F. R. Section 1057.4 (a) (4) which would prohibit two freely contracting parties from determining, as between themselves,

> which party will ultimately bear the cost of damages done to a third person. The only conceivable argument against such an arrangement would be that the regulation seeks to prevent indemnification on the theory that a trucking company, knowing that it does not have to pay damages, might tend to be less careful in supervising and controlling the actions of its truck drivers. However, the same can be said of insurance coverage which the regulations obviously do not prohibit. We are of the opinion that had the I. C. C. intended to prevent indemnification between trucking companies it would have said so in precise terms."

The Sixth Circuit of the Court of Appeals in the cause under consideration at page A11 of the report of that opinion appearing in Appendix C of the Petition for Certiorari said:

> "That the lessor in the present case agreed to reimburse the lessee for any losses in no way impairs the public's right of recourse against Ryder for damages caused by its operation of the truck in Louisiana. On the contrary, the indemnification agreement would appear to have the effect of strengthening the possibility of recovery by a third party in that it would provide another source or 'pocket' from which a recovery could be obtained. The argument that the indemnification provision would have the effect of making Ryder less careful in its operation of the vehicle in that it would enable Ryder to transfer its losses to Jones is unconvincing. The uncertainties and inconveniences attendant upon enforcement of such an indemnification provision are alone sufficient to motivate the indemnitee to pursue a course of caution and prudence in its operations. Another factor which would nor-

mally cause a carrier to avoid accidents or injuries to third persons would be its desire to establish a name for conducting a safe operation to protect itself against a reputation for carelessness or indifference to the rights of others."

Petitioner relies on the Nebraska case of *Denver Midwest Motor Freight, Inc.* v. *Busboom Truck, Inc.*, 190 Neb. 231, 207 N.W.2d 368 (1973). There at page 371 the Supreme Court of Nebraska pointed out:

"There are obvious factual differences between the *Alford* and the *Allstate* cases upon which they might be distinguished."

The Nebraska Court analysis clearly distinguished it from the case under consideration. At page 371 the Court said:

"In the case before us the lease form was drawn by the lessee. It did not contain any provision requiring the lessee to assume full common carrier responsibility for the operation of the vehicle."

Compare with the language of the lease under consideration (page A23, Appendix E, Petition for Certiorari) which states:

". . . and the Lessee assumes full responsibility in respect to the equipment it is operating to the public, the shipper and the INTERSTATE COMMERCE COMMISSION." (Capitalization appears in the original).

CONCLUSION

The petitioner asks this Court to grant the Petition for Certiorari on the grounds that the *Alford* case in the Seventh Circuit is in conflict with opinions of the Fourth, Fifth and Sixth Circuits. *Alford* is clearly distinguishable, and there is no conflict in the Appellate Courts of the United States on the issue of whether indemnification agreements under 49 C.F.R. 1057.4 are enforceable where the lessee exercises exclusive possession, control and use. Consequently, respondent prays that the Petition for Certiorari be denied.

Respectfully submitted,

NELSON, NORVELL, WILSON, MCRAE, IVY AND SEVIER

By: /s/ ALBERT T. MCRAE

Attorney for Respondents, Ryder Truck Lines, Inc. and American Casualty Company